CEMPAKA FINANCE BHD

v.

FAJAR LODGE SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-650-1998]
1 DECEMBER 1999

CIVIL PROCEDURE: *Summary judgment - Appeal - Whether order granting summary judgment may be appealed against - Whether defendant may only seek remedy by application to set aside - Whether plaintiff will lose one stage of hearing or appeal if defendant proceeds by way of appeal - Whether plaintiff would be prejudiced if defendant proceeds by way of appeal - Rules of the High Court 1980, O. 14 r. 11 & O. 56*

CIVIL PROCEDURE: *Appeal - Notice of - Orders appealed against and orders sought to be obtained - Whether stated in notice of appeal - Whether inclusion of causal link between ground of appeal and order appealed against fatal to notice of appeal - Whether inclusion of reason why orders sought ought to have been given fatal to notice of appeal - Whether appellate court may not make orders different from that sought - Rules of the High Court 1980, Form 114*

CIVIL PROCEDURE: *Appeal - Appeal from registrar - Whether amounts to a rehearing - Whether such appeals and hearings on application to senior assistant registrar are one stage of hearing*

CIVIL PROCEDURE: *Adjournment - Absence of counsel on medical grounds - Medical certificate dated one day but certifying counsel to be unfit for next day - Refusal of adjournment - Whether may be appealed against - Whether court ought to inquire into counsel's circumstances on that day - Whether counsel ought to be asked to file affidavits explaining his circumstances*

This was an appeal pursuant to O. 56 of the Rules of the High Court 1980 ('RHC') against an order granting summary judgment which followed the senior assistant registrar's decision to proceed to hear the plaintiff's application in the absence of the defendants' counsel. The defendants' counsel could not attend court due to medical reasons and a medical certificate was accordingly submitted. Notwithstanding this, the defendants' request for an adjournment was turned down by the senior assistant registrar. The medical certificate was dated 17 July 1998 but it certified counsel to be unfit for duty on 18 July 1998, the day he was to be in court. It was also in evidence that counsel for the defendants had called the court from his office on 18 July 1998.

In this appeal, the plaintiff raised the following preliminary objections: (i) the notice of appeal did not conform with Form 114 in that the orders appealed against were not stated in the notice of appeal and neither were the orders sought to be obtained stated therein; (ii) whether, in the light of the case of *Insas Bhd v. Ayer Molek Rubber Co Ltd*, there can be an appeal on the question of adjournment; and (iii) as this case fell within the scope of O. 14 r. 11 of the RHC, the defendants can only seek their remedy by an application to set aside the judgment and not by way of an appeal. Further to this third preliminary objection, the plaintiff submitted that by the defendants proceeding via an appeal to the judge instead of applying to the senior assistant registrar for setting aside, the plaintiff will lose one stage of hearing or appeal and thus it would be prejudiced.

Held:

[1] The notice of appeal does state the orders appealed against. From the manner the orders appealed against are stated in the notice of appeal, it can be understood that the defendants are aggrieved by the refusal of the adjournment and by the summary judgment which ensued as a result of the senior assistant registrar proceeding to hear the plaintiff's application in the absence of the defendants' counsel. The appeal is, in effect and ultimately, an appeal against the summary judgment but based on the ground that the senior assistant registrar ought to have allowed the adjournment. The fact that the causal link between the refusal of the adjournment and the summary judgment is included is not fatal to the notice of appeal. It is in fact useful as an indication of the ground of appeal against the summary judgment.

[2] The notice of appeal also does state the orders sought to be obtained. The fact that, in stating the orders sought, the reasons why they ought to have been granted are also given is again not fatal to the notice. The issue of whether the orders sought are proper in view of the manner in which the orders appealed against are stated is a matter to be decided on the disposal of the appeal. The court may always, on appeal, make orders suitable to the circumstances although they differ from the orders sought to be obtained.

[3] As to whether there can be an appeal on the question of adjournment, the question loses its importance when the appeal is viewed as an appeal against summary judgment with the refusal of adjournment being the sole ground for the appeal.

[4] Order 14 r. 11 of the RHC states that the "judgment … may be set aside" and thus, it does not preclude the defendants from appealing under O. 56 of the RHC. The defendants are not confined to seeking their remedy only by an application to set aside the judgment.

[5] Hearings on an application to a senior assistant registrar and on an appeal from his decision are in effect one stage because both are hearings in the High Court. The hearing of an appeal before the judge is in practice a rehearing.

[6] The senior assistant registrar had to make his decision about the adjournment on 18 July 1998 itself. He had no time to investigate or to call for affidavits to verify the true condition of the defendants' counsel on that date. It will not be sufficient to consider the question solely on the circumstances apparent to the senior assistant registrar on 18 July 1998. The defendants' counsel may want to state on oath his actual circumstances on 17 and 18 July 1998, something which he could not have done for the senior assistant registrar on that date.

[Preliminary objections dismissed; defendants' counsel to file affidavit deposing to his personal circumstances on 17 and 18 July 1998 within 14 days.]

Case(s) referred to:
Bank Bumiputra Malaysia Bhd v. Aik Lee Feedmill Co Ltd [1999] 6 CLJ 1 ***(not foll)***
Insas Bhd v. Ayer Molek Rubber Co Ltd [1995] 3 CLJ 328 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 11, O. 56

For the plaintiffs - Wong Ming; M/s Zairina Loh & Wong
For the defendants - R Kengadharan; M/s Kengadharan & Co

Reported by S Dharmendran

JUDGMENT

Abdul Aziz Mohamad J:

As regards compliance of the notice of appeal with Form 114, I find that the notice of appeal does state the orders appealed against. They are the order of the senior assistant registrar ("SAR") refusing the application for an adjournment and the order of the SAR giving summary judgment after hearing the plaintiffs' counsel in the absence of the defendants' counsel. From the manner the orders appealed against are stated in the notice of appeal, I understand that the defendants are aggrieved by the refusal of the adjournment and by the summary judgment which ensued from the SAR's proceeding to hear the plaintiffs' application in the absence of the defendants' counsel. The appeal is, in effect and ultimately, an appeal against the summary judgment but based on the ground that the SAR ought to have allowed the adjournment. The fact

that the statement of the order appealed against No. (ii) also states the causal link between the refusal of the adjournment and the summary judgment is not fatal to the notice of appeal and is in fact useful as an indication of the ground of the appeal against the summary judgment, the ground being that the refusal of the adjournment was wrong. If and when the appeal comes to be heard, the only question will then be whether the adjournment ought to have been granted. If it ought to have been granted, the appeal should be allowed, the summary judgment set aside and the SAR ordered to hear the application afresh.

I find that the notice of appeal also does state the orders sought to be obtained. The fact that, in stating the orders sought, the reasons why they ought to have been granted are also given is again not fatal to the notice. As to whether the orders sought are proper in view of the manner in which the orders appealed against are stated, that is a matter to be decided on the disposal of the appeal. The court may always, on an appeal, make orders suitable to the circumstances although they differ from the orders that are stated to be sought to be obtained. I have already indicated that as the defendants' grievance is over the refusal of the adjournment, and as the adjournment was sought on medical grounds, the order sought No. (ii), and also a part of the order sought No. (iii), may not be appropriate.

As to whether there can be an appeal on the question of adjournment, the question loses its importance on the appeal being viewed as an appeal against summary judgment, with the refusal of adjournment as the sole ground for the appeal. Moreover, the passage cited by the plaintiffs' counsel from *Insas Bhd v. Ayer Molek Rubber Co Ltd* [1995] 3 CLJ 328; [1995] 2 MLJ 833 is about appeals against the granting of adjournments whereas here the grievance of the defendants is over the refusal of an adjournment, which refusal has resulted in a judgment against them.

As to O. 14 r. 11, although this case does fall within the scope of that rule because it is a case of a "judgment given against a party who does not appear at the hearing of an application under r. 1", I do not think that the defendants are confined to seeking their remedy only by an application to set aside the judgment. The rule says that the "judgment ... may be set aside". It does not preclude the defendants from appealing under O. 56. The defendants should not be told that they ought to have proceeded under O. 14 r. 11 unless it can be shown that by their taking the appeal route the plaintiffs would be prejudiced. The only prejudice suggested by reference to *Bank Bumiputra Malaysia Berhad v. Aik Lee Feedmill Co Ltd* [1999] 6 CLJ Supp 1; [1999] 4 AMR 4106 is that by the defendants' going on an appeal to the judge instead of applying to the SAR for setting aside, the plaintiffs will lose one stage of

hearing or appeal. But I do not think that the loss is a material loss because hearings on an application to an SAR and on an appeal from his decision are in effect one stage because both are hearings in the High Court and the hearing of an appeal before the judge is in practice a rehearing.

For those reasons I dismiss the preliminary objections.

As I said, the issue in the appeal is whether the SAR was right in refusing the adjournment. On 18 July 1998, according to the SAR's notes, the plaintiffs' counsel expressed doubt about the genuineness of the medical certificate from the defendants' counsel because it was dated 17 July 1998 but the defendants' counsel's unfitness for duty was certified for 18 July. In refusing the adjournment, the SAR did not expressly say that the medical certificate was not genuine. He said he refused the adjournment after scrutinising the certificate and after getting a telephone call from the defendants' counsel who said he was telephoning from the office. It is possible that the SAR was influenced by the facts that the certificate was dated 17 July and that on 18 July the defendants' counsel was able to telephone from the office. It comes down to the question whether the SAR was right in deciding, as he must have done, that the defendants' counsel had no valid excuse for not attending court on 18 July and for seeking an adjournment.

The SAR had to make his decision about adjournment on the 18th itself. He had no time to investigate or to call for affidavits to verify the true condition of the defendants' counsel on that date.

For the purposes of the appeal, it will not be sufficient to consider the question solely on the circumstances apparent to the SAR on 18. The defendants' counsel may want to state on oath his actual circumstances on 17 and 18 July, something which he could not have done for the purposes of the SAR. If there is truth to be told, let it be told in this appeal. For that reason, I will allow the defendants' counsel to file within fourteen days an affidavit deposing to his personal circumstances on 17 and 18 July that are relevant to his failure to attend court on 18 July. The plaintiffs will of course have the right to file an affidavit in reply.